United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1233

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

8/11

BJS

UNITED STATES OF AMERICA, Appellee, -against- HECTOR GARCIA Defendant-Appellant.	Docket No. 76-1233

BRIEF FOR APPELLANT GARCIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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QUESTION PRESENTED

Whether the search of the truck was made without probable cause to believe that the fruits of a crime were therein and thus unconstitutional.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable Thomas C. Platt) rendered on May 21, 1976, convicting appellant of possession of goods stolen from interstate commerce and conspiracy to possess such goods. He was sentenced to two years in prison.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal.

STATEMENT OF FACTS

On March 9, 1976, appellant and Eduardo Rua were indicted for possession of 704 cases of vodka and brandy stolen from interstate commerce (count one) and conspiracy to possess such goods (count two).[1]

A. Pre-Trial Suppression Hearing

Prior to trial, appellant Garcia moved to suppress various cases of Blansac Brandy and Majorksa Vodka, seized on March 22, 1974, by agents of the FBI and any statements resulting from the illegal search and seizure (Record on Appeal, Docket Number 2). At the hearing to determine this motion, FBI agent McMahon testified that on March 19, 1974,

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[1]Appellant had been arrested and charged with the crime on March 22, 1974. The charges were subsequently dropped on May 3, 1974 (199, 204) but then re-instituted.

McMahon was telephoned by an unidentified informant, who had previously given information resulting in arrests or conviction (H8) although McMahon could not reveal any cases (H55). The informer did not reveal the source of his information (H50) but stated that he had received information indicating that stolen vodka was stored in New York City. (H48).[2] The informant did not know the location of the vodka, but furnished the FBI with the telephone number of the building in which the vodka was allegedly stored (H49). As a result of further investigation, the FBI determined that this building, a warehouse, was located at 187 Kent Avenue, Brooklyn, New York.[3] Surveillance of the building began on March 20, 1974 (H6, 32).

On March 22, 1974, at approximately 9:00 a.m., a truck entered the warehouse through an overhead metal door which was immediately closed. A short time thereafter, the truck was driven out (H58). Since the warehouse had no windows, the agents who participated in the surveillance

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[2]Numerals in parenthesis preceded by "H" refer to minutes of the pre-trial suppression hearing.

[3]During FBI agent Teel's initial testimony, he stated that the informant told the FBI that the stolen liquor in question was located at 187 Kent Avenue in Brooklyn (H5). Shifting his ground, Agent Teel later indicated that the informant had given the location of the stolen brandy. This testimony conflicted with Agent McMahon's testimony that the informant had stated that stolen vodka was in the Brooklyn warehouse. Since Agent McMahon was the only agent who directly communicated with the unidentified informant (H14), and since further information was necessary to ascertain the building involved, it is apparent that McMahon's testimony about the informant's tip must be credited and that Agent Teel's testimony was patterned to coincide with that evidence eventually seized as a result of the tip.

could not see what had occurred inside (H8-9, 31). After leaving the warehouse, this truck was followed by FBI agents (H59, H60-65). Eventually, the truck was parked on Remsen Street in Brooklyn and FBI surveillance continued until the truck was seized.

Later that same day, at 4:00 p.m., another truck the contents of which was unknown, went into the warehouse (H9, 31) and left approximately one hour later (H31). In order to close the door of the warehouse, the driver, who was identified as appellant Garcia (H10), got out of the cab of the truck, leaving the door open, and walked toward the building (H9, 34). FBI Agent Teel, who had been standing nearby, then walked toward the cab of the truck (H9). The agent testified that from ten to fifteen feet away, he saw a case of Blansac Brandy on the front seat of the truck (H10, 20, 34). After identifying himself to appellant Garcia, agent Teel asked appellant Garcia what was in the truck. Appellant responded that he did not know. Agent Teel then questioned appellant about the brandy on the front seat: whether it was appellant's and where it came from. Agent Teel testified that appellant simply shrugged (H10, 34-35). After this, another agent opened the rear door of the truck and saw that the truck contained cases corresponding to those that had been stolen. Appellant Garcia was then arrested (H12, 23-24, 36), and the truck and its contents seized (H13).

At 9:00 p.m. that same day, after learning of appellant's arrest and the seizure of the cases of brandy from the second truck, FBI agents searched the truck which had been parked on Remsen Street (H64-65). Stolen liquor was discovered in the truck (H65).

At the hearing, appellant Garcia argued that in light of the facts shown, the agents did not have probable cause to search the truck containing the cases of brandy, that therefore, this search was impermissible and that the evidence seized as a result should be suppressed (H39, H81-82). The District Court denied the motion to suppress, finding that the agents had probable cause to search the vehicle containing the brandy and that once having found stolen brandy in the first truck, the search of the other truck was proper (H82-83).

B. The Trial

On March 19, 1974 (11),[4] Philip Gallegos, driving a tractor trailer truck, picked up a load of scotch, brandy and vodka[5] at Black Prince Liquors[6] in Clifton, New Jersey (13-17), which was ultimately destined for Florida (24). Gallegos stopped for lunch, and when he returned, his truck was seized by two men, at least one of whom carried a gun (18).

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[4]Numerals in parenthesis refer to pages in the trial transcript.

[5]The vodka was valued at $17,658 (27).

[6]Gallegos called it Prince Liquor Company.

Gallegos was ordered to lie down in the back of a car and was covered w th a blanket. In that pose, he was driven around for about six hours before being dropped off in New Jersey (19-20).

Later that day FBI agent Ronald Kosednar found a tractor trailer in lower Manhattan containing several hundred cases of brandy and vodka and the invoices which had previously been identified by Gallegos as those given to him (32-35).

On March 20, 21, and 22, 1974 the FBI maintained surveillance of a warehouse located at 187 Kent Street, Brooklyn, New York (see 38, 141) and rented to Mini-City Wholesalers, a business owned by Eduardo Rua (108).[7] On the first two days numerous people tried to get into the warehouse, but were unable to do so (143).

At about 9:00 a.m., on March 22, 1974, a yellow 4-Gs rental truck backed into the warehouse.[8] Because the building had no windows, the agents could not observe anything

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[7]Rua had rented the building in September, 1973. Between September 1973 and March 1974, the business was a wholesale grocery begun by Rua with an $80,000 Small Businessmen's Administration Loan. The business suffered almost immediate losses and Rua asked for extensions within which to re-pay his loan (121-132). Rua had paid no rent after March, 1974. He was dispossessed in April, 1974, and when the rental agent-owner entered the premises only some food was found (109-112).

[8]This truck, and the one discussed, infra, were rented to Mini-City Wholesalers on March 22, 1974 (101). Appellant, who was a helper at Mini-City Wholesalers (168, 171), rented the trucks using, at least for the first truck, the drivers license of another person (144-5) whom appellant believed was to use the truck ( ).

inside (40-41). Fifteen to thirty minutes later the truck emerged and the driver, identified as appellant (44), got out of the truck and spoke with another man (41-42). The two men walked away (43).

About four hours later, two people returned to the truck (44, 137). They drove the truck to a grocery store, entered the store, returned fifteen minutes later, drove around for a while, parked the truck and walked away (48).[9] Two agents identified the driver of the truck as appellant (138, 289).

At 4:00 p.m. on the same day appellant drove another 4-G's rental truck into the warehouse. About one hour later, the truck was driven out of the building (63-64). As appellant (66) went to close the door, the agent, Thomas Teel, saw in the front seat a case of brandy (65). Teel asked the appellant what was in the truck and he responded that he did not know (65). Asked if he had shipping papers, appellant said "no" (66). Appellant shrugged when asked if the carton in the front was his or if it bel ged to anyone else (66). The agents opened the doors of the truck and found brandy inside (67).[10] Appellant was arrested (69-70).

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[9] Over defense counsel's objection, FBI agent Colgan was permitted to testify that in his opinion the two men knew they were being followed by the police and left the truck (50).

[10] Objections previously made to the illegal search and seizure renewed (68).

At about 9:00 p.m., the truck first driven from the warehouse was searched and cartons of brandy and vodka were taken (51). In total, 704 cases of liquor were seized from the two rental trucks (86).

At trial appellant explained that he rented the first truck at the direction of Marcos Burgos, Rua's assistant (248, 268), who also told him to load the truck with vodka (172) at the warehouse and leave it outside (172). Burgos told him to do the same with the second truck (180-183). He denied any knowledge that the liquor was stolen.

Appellant's testimony was impeached by a statement he had given at the time of his arrest in which he said Rua gave him the instructions (201-2, 223).[11] It was also impeached by a statement given by appellant to the Assistant United States Attorney without the aid of counsel in December, 1975, to the effect that a man named Matias gave the instructions (226). Appellant's appearance before the Assistant United States Attorney (236) was at Rua's request at a time when no charges were pending against appellant.[12]

Rua testified that Matias had asked for permission to store liquor at the warehouse for $1,000 a day. However, Rua said that he had rejected the offer (249). He testified

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[12]This statement was the subject of a pre-trial motion to suppress.

[13]The Court ruled that counsel had waived any objection to the use of this statement by not challenging it at the pre-trial hearing (207-8).

that he was not in New Yo. . on March 22, 1974 (258), having gone home to Puerto Rico earlier in the month (250).

Rua's testimony was contradicted by that of FBI agent Ponzio. Ponzio testified that Rua had stated that he left New York after appellant had been arrested (295).

POINT I

THE SEARCH OF THE TRUCK WAS MADE WITHOUT PROBABLE CAUSE TO BELIEVE THAT THE FRUITS OF A CRIME WERE THEREIN AND WAS THUS UNCONSTITUTIONAL.

Agent Teel who searched the 4-G's rental truck had the following information at the time of the search:

> that a truck load of vodka, brandy and scotch had been hijacked;
>
> that an informer had advised that stolen vodka was located in New York City;
>
> that the source of the informer's information was unknown;
>
> that the informer's information led agents to a warehouse at 147 Kent Street;
>
> that a truck drove into the warehouse at 4:00 p.m.;
>
> that the truck left the warehouse and on the front seat was a case of brandy.[14]

The information given by the informer could not be relied upon to establish probable cause since the source of that information was unknown to the agents. Without some statement of the underlying circumstances forming the basis of the informant's conclusion that there was evidence on the premises, his tip is not sufficient to establish probable cause. Spinelli v. United States, 393 U.S. 410

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[14] It is unclear from the record whether agent Teel was aware that a truck had entered the warehouse earlier that morning. However, it is apparent that he did not know what happened to that truck (H65-66) or who the driver was until after the search of the second truck (H26).

(1969); Aguilar v. Texas, 378 U.S. 108 (1964); United States v. Karathanos, 531 F.2d 26 (2d Cir. 1976).[15]

Not only was the informer's tip inadequate, but the agents learned nothing from their independent observations that would demonstrate the reliability of the information. Whiteley v. Warden, 401 U.S. 560, 567 (1971); Draper v. United States, 358 U.S. 307 (1959). The agents acknowledged that they did not see into the interior of the warehouse because it had no windows. They could not see what was inside of the truck and therefore did not know either its contents when it entered the warehouse or whether it contained anything obtained from the warehouse. The carton of liquor on the front seat of the truck was brandy, and not vodka as the informer had stated. The testimony also shows that the agent only saw the brandy in the truck after appellant got out of the truck leaving the door open (H10). Thus, the agent could not conclude that the case of brandy had come from the warehouse rather than having been in the truck before the truck was driven into the building.

The probable cause required to search the truck (Dyke v. Taylor Instrument Co., 391 U.S. 216, 221 (1968)) thus depends on the finding of the case of brandy in the front seat and the appellant's responses to Agent Teel's questions.

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[15] At the hearing, the Government expressly denied any reliance on the informant (H38, 41).

As indicated, there was no basis for believing that the case of brandy came from the warehouse. Further, since the agents did not compare the number on the case with the numbers of those reported stolen until after the search, there was no basis for believing that the case came from the shipment stolen.

Appellant's response to Agent Teel's inquiries also fails to establish probable cause. Appellant said he did not know what was in the truck, and he shrugged his shoulders when asked if the case of brandy was his (H10). These statements gave the agents no basis for believing that the truck contained stolen liquor. Since the agents had no basis for concluding brandy was in the warehouse, and did not know what occurred in the warehouse, or whether the truck was loaded with anything when it went into the warehouse, or where it had been previous to entering that building, the appellant's responses add no information to what the agents already had. On the facts as they knew them there was not even any basis for concluding appellant was not telling the truth when he both stated and implied that he had no information to give them since they simply had no basis for evaluating his credibility. See United States v. Squires, 456 F.2d 967 (2d Cir. 1972). Further, the agents had no information tying appellant to the theft from the original tractor trailer two days earlier and the appellant's responses did not provide them with that information. There was no basis for concluding that appellant possessed stolen

liquor. United States ex rel. Mungo v. La Vallee, 522 F.2d 211, 216 (2d Cir. 1975).

The agents having no probable cause to search the truck by opening its back doors, the resulting arrest of appellant was invalid. Furthermore, his subsequent statement as well as the search of the other truck resulting from the primary illegality were also inadmissible. Wong Sun v. United States, 371 U.S. 471 (1963). See Brown v. Illinois, 422 U.S. 540 (1975).

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT STATED ABOVE SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Aug 11, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

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